does not squarely conflict with a "sole[]" holding of this Court or another court of appeals. U.S. Br. 17. Its use of the qualifier "solely" presumably is meant to account for the fact that this Court has indeed "declined to apply a presumption against preemption … on the ground that the relevant sphere of conduct had not traditionally been regulated by the States." U.S. Br. 17; *see* Pet. 14-15 (discussing, among others, *Buckman Co.* v. *Plaintiffs Legal Comm.*, 531 U.S. 341, 347-48 (2001)).

The government further argues that there is no conflict among the circuits. This is not so. At an absolute minimum, the decision of the First Circuit in *UPS, Inc.* v. *Flores-Galarza* conflicts squarely with the decision in this case, as well as decisions of the Fourth and Seventh Circuits stating that the presumption against preemption always applies. Compare 318 F.3d 323, 336 (1st Cir. 2003) (the presumption "*only* arises … if Congress legislates in a field traditionally occupied by the states" (emphasis added)), with *Frank Bros., Inc.* v. *Wisconsin Dep't of Transp.*, 409 F.3d 880, 885 (7th Cir. 2005) ("we presume that, *in all circumstances*, 'Congress does not intend to supplant state law'" (emphasis added)), and *Pinney* v. *Nokia, Inc.*, 402 F.3d 430, 453 (4th Cir.), *cert. denied*, 126 S. Ct. 551, 552 (2005) (Nos. 05-198, 05-207); see Pet. 16-17 (discussing same). The government dismisses the clear statement in *UPS* as "dictum," U.S. Br. 19 n.7, but it is nothing of the sort—this was the First Circuit's clear statement of the governing principle, it was unequivocal, and it remains the law of the First Circuit. 318 F.3d at 336. The government does not even cite, much less address, *Frank Brothers* and *Pinney*.

The remainder of the government's argument depends upon giving the case law an unduly narrow reading. But even parsing the cases as finely as the government does, its argument fails. It seeks to divide the cases into two categories: those holding that the presumption *does* apply when there is a history of *state* regulation, and those holding that it *does not* ap-

ply when there is a history of *federal* regulation. Thus, it suggests, this case falls into an intermediate category—with no history of federal or state regulation—that it says neither the court below nor other courts have addressed. U.S. Br. 18-19 & nn.5-6. This is not so. The all-or-nothing cases cited above, and largely ignored by the government, would apply equally to this supposed intermediate zone. Other cases likewise do not fall into the neat dichotomy the government posits. *E.g.*, *Public Util. Dist. No. 1* v. *Odacorp Inc.*, 379 F.3d 641, 648 n.7 (9th Cir. 2004) ("'We apply a presumption against federal preemption unless the state attempts to regulate an area in which there is a history of significant federal regulation.'").

In any event, the decision below does place this case into one of the two categories the government intuits—it treats this as a case with no history of federal regulation, for it would not have applied the presumption if there were such a history. Pet. App. 4a n.1. The Ninth Circuit would find a history of federal regulation in a New Deal-era statute. *Id.* (citing *Ting* v. *AT&T*, 319 F.3d 1125, 1136 (9th Cir. 2003), which relied upon the Federal Communications Act of 1934)). But the line drawn by this case and *Ting* conflicts directly with cases holding that a shorter history suffices to defeat the presumption, as well as cases that require a longer history of federal regulation. The First Circuit has held that a federal statute more recent than EPCA—the Federal Aviation Administration Authorization Act of 1994—sufficed to demonstrate a history of federal regulation that defeated application of the presumption. *UPS*, 318 F.3d at 336. By contrast, the California Supreme Court has held that even federal regulation since 1935 is not enough; "federal activity" must be "'manifest since the beginning of our Republic.'" *Bronco Wine Co.* v. *Jolly*, 95 P.3d 422, 441 n.42 (Cal. 2004), *cert. denied*, 125 S. Ct. 1646 (2005); see also *Pinney*, 402 F.3d at 454 n.4 ("there is not the same federal presence in the wire-

less telecommunications area as there is in the area of maritime commerce" at issue in *Locke*).

Most importantly, it remains abundantly clear that the Ninth Circuit's formulation of the presumption against preemption, and the repeated "narrow interpretations" that followed from its application of the presumption, drove the result in this case. The government offers only the most timid suggestion to the contrary, U.S. Br. 15, and instead relies upon its own statutory analysis. That analysis is wrong, for all of the reasons set forth above, and so what remains is the badly distorted statutory analysis set forth by the Ninth Circuit. Given the importance of this issue, both to the national regulatory scheme that Congress enacted and to the regulated industries governed by that scheme, it plainly merits this Court's review.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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No. 05-331

IN THE

Supreme Court of the United States

AIR CONDITIONING & REFRIGERATION INSTITUTE *et al.*,
Petitioners,

v.

ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

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REPLY BRIEF

In the decision below, the Ninth Circuit distorted a federal statutory scheme because it found the State's regulatory approach to be "laudable," a proposition unsupported by any record evidence. This method of statutory interpretation, objectionable in and of itself, flies in the face of this Court's decision just two Terms ago to vacate a similar Ninth Circuit decision, which likewise interpreted a federal preemption provision in a limited, atextual fashion to uphold a state statute that the Ninth Circuit deemed praiseworthy. See *Engine Mfrs. Ass'n* v. *South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) ("*EMA*"). This alone merits certiorari. See Sup. Ct. R. 10(c) (review is warranted when a lower court "decided an important federal question in a way that conflicts with relevant decisions of this Court").

Moreover, in the course of ignoring this Court's recent precedent, the decision below exacerbated a circuit split over the proper application of the "presumption against preemption." Respondent CEC all but concedes the existence of this conflict, answering only that the conflict is not acknowledged, and that it can be written off as merely loose language employed by some courts of appeals. The former contention is quite beside the point, and the latter simply is not true. The lower courts are in disarray over the proper application of the presumption against preemption, and the conflict on this issue is beyond question. This Court's review is necessary to bring clarity to this recurring issue that arises in a badly confused area of law under the Supremacy Clause.

I. THE DECISION BELOW CONFLICTS WITH BINDING PRECEDENT OF THIS COURT ON AN IMPORTANT QUESTION OF FEDERAL LAW.

The Petition demonstrates that the decision below stands squarely in conflict with *EMA*. Pet. 11-14. In *EMA*, this Court analyzed an express preemption provision of the Clean Air Act "which prohibits the adoption or attempted enforce-

ment of any state or local 'standard relating to the control of emissions from new motor vehicles or new motor vehicle engines.'" 541 U.S. at 251. At the center of this Court's decision was its interpretation of the statutory term "standard." Adopting an approach designed to preserve state law at all costs, the Ninth Circuit held that the generic term "standard" did not include "standards imposed through purchase restrictions." *Id.* at 256. This Court rejected that limiting interpretation because the language of the statute "is categorical." *Id.*

Here, too, the Ninth Circuit sought to circumvent the "categorical" language of the statute. In sweeping language, the Energy Policy and Conservation Act preempts "*any* State regulation [that] provides *at any time* for the disclosure of information with respect to *any* measure of energy consumption." 42 U.S.C. § 6297(a) (emphases added). Rather than interpret the term "disclosure" by its terms, however, the Ninth Circuit applied a "narrow interpretation," see Pet. App. 7a, to conclude that the term means "labeling directed to consumers at point of sale or use," *id.* at 8a. In both this case and in *EMA*, the Ninth Circuit imposed an atextual limitation on statutory text. Certiorari is warranted, just as in *EMA*, to reverse the Ninth Circuit's erroneous interpretation of an important federal statute. Indeed, review is more important here than it was in *EMA*, so that this Court can reaffirm the validity of its own recent precedent that the Ninth Circuit casually cast aside. See *id.* at 22a (Noonan, J., dissenting).

It is telling that the CEC has almost nothing to say about *EMA*, other than to argue that this case involves "a different statute." Opp. 11. It should hardly require explanation that, although the two cases interpret different statutes, they concern the same *legal rule*—namely, that lower courts should not distort the text of federal statutes in an effort to preserve from preemption state statutes that they find "laudable." The Ninth Circuit took that approach in *EMA*, and this Court re-

versed. The Ninth Circuit followed precisely that course again here, and this Court again should reverse.[1]

For the same reason, the CEC is mistaken to argue that there is no important issue of federal law at stake. Opp. 4. It is of course true, as CEC argues, that at its narrowest this case involves the interpretation of a preemption provision in one federal statute. *Id.* But this is true of every case involving express preemption under the Supremacy Clause, and it has been no barrier to this Court's granting review to interpret numerous statutory preemption clauses—including four in the last two Terms alone.[2]

This is for good reason. Whether a court may impose a crabbed, atextual interpretation on a statutory preemption provision is a question of surpassing national importance and federal concern. It has substantial implications for the legislative process. If courts may do what the Ninth Circuit did here, then the legislative bargains that lie at the heart of complex regulatory statutes will be undercut, leading to uncertainty in the legislative process, and placing entities regulated at the federal level unsure as to what rules to follow. Preemption provisions are often enacted to ensure that, when an industry is subjected to additional regulatory burdens at the federal law, it can count on uniform regulation. But if the guarantee of uniformity is meaningless—as it is following decisions like the Ninth Circuit's in *EMA* and this case—then the

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[1] The CEC also argues that *EMA* presented a better case for review because it involved a circuit split over the interpretation of a particular statute. Opp. 11. To the contrary, *this* is the more compelling case for certiorari. In addition to its conflict with *EMA*, the decision below involves a well-established conflict over a fundamental legal principle—the proper application of the presumption against preemption—that affects not just a single statute, but potentially governs the preemptive effect of every federal statute. *See* Pet. 14-21; *infra* Section II.

[2] *See Mid-Con Freight Sys., Inc.* v. *Michigan Pub. Serv. Comm'n*, 125 S. Ct. 2427 (2005); *Bates* v. *Dow Agrosciences LLC*, 125 S. Ct. 1788 (2005); *Aetna Health Inc.* v. *Davila*, 542 U.S. 200 (2004); *EMA*, 541 U.S. 246 (2004); *Nixon* v. *Missouri Mun. League*, 541 U.S. 125 (2004).

legislative deal is undone, thereby creating great uncertainty and imposing tremendous costs on interstate businesses. See Pet. 23-24 & nn.14-17; Br. for Alliance of Automobile Mfrs. *et al.* as *Amici Curiae* ("AAM Br."), at 12-16. These are indeed important questions of federal law, and they merit this Court's review.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS REGARDING THE "PRESUMPTION AGAINST PREEMPTION."

The Petition further demonstrates that there is a well-developed conflict among the courts of appeals concerning the proper formulation of the "presumption against preemption." Pet. 16-17. At least eight circuits have weighed in, and they are badly divided. The First, Second, Eighth, Eleventh and D.C. Circuits hold that the presumption only applies when the federal preemption provision concerns a field of significant or "traditional" state regulation. *Id.* at 16 (citing cases). This formulation is consistent with this Court's prior decisions. *Id.* at 14-15. In direct conflict, the Fourth, Seventh and Ninth Circuits *always* apply the presumption. *Id.* at 16-17. Given the breadth and maturity of this conflict—and particularly in light of the innumerable federal preemption provisions that are necessarily affected by the presumption—this important issue of federal law warrants review.

The CEC's inability to muster a substantive argument why this conflict is unworthy of certiorari only confirms that certiorari is appropriate. The CEC seeks to cast aside the circuit split, chalking it up to "incidental differences in wording" among the circuits. Opp. at 6. But it offers no analysis to substantiate this assertion—no showing that the conflict is illusory, or that the cases actually employ the same legal rule. That is no mere oversight: Even the most cursory review reveals that the lower courts have announced flatly inconsistent rules. The First Circuit, for instance, in *UPS, Inc.* v. *Flores-Galarza*, declined to apply the presumption because it "*only*

arises ... if Congress legislates in a field traditionally occupied by the states." 318 F.3d 323, 336 (1st Cir. 2003) (emphasis added). The Seventh Circuit, by contrast, has reasoned that the presumption applies "in *all* circumstances." *Frank Bros., Inc.* v. *Wisconsin Dep't of Transp.*, 409 F.3d 880, 885 (7th Cir. 2005) (emphasis added). The problem is not that the courts of appeals are failing to use "the exact same words," Opp. 6; it is that they are not using the same *principle*.

The conflict over this principle, moreover, is an extremely important one. Prominent commentators repeatedly have criticized the lack of clarity surrounding the presumption against preemption. See, *e.g.*, Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo. L.J. 2085, 2086 (2000); Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 298-303 (2000). And, others have indeed "supposed," cf. Opp. 7, that this case merits this Court's review—in fact, this petition is not even the only one currently pending before the Court that presents this precise issue. See Petition for Writ of Certiorari at 25-26 & n.6, *Nokia, Inc.* v. *Naquin*, No. 05-198 (filed Aug. 10, 2005). The briefs filed in that case further demonstrate the intractable confusion surrounding the application of the presumption. There are conflicts over numerous aspects of when the presumption arises and how it should be applied. For instance, there is genuine disarray as to what federal presence in a field is sufficient to overcome the presumption when it otherwise would apply, and disagreement about how to define the relevant domains of state and federal regulation in deciding whether either has significantly, traditionally or historically regulated a field. See Br. of Product Liability Advisory Council, Inc. as *Amicus Curiae* at 6-13, *Nokia, Inc.* v. *Naquin*, No. 05-198 (filed Sept. 30, 2005).[3]

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[3] Because *Nokia* relates to conflict preemption (rather than express preemption) and has an overlay of regulatory preemption, it would be appropriate to grant certiorari in both *Nokia* and this case. At a minimum, however, if certiorari is granted in *Nokia*, this petition should be held pending resolution of that case.

III. THE DECISION BELOW WAS MISTAKEN, AND THREATENS SERIOUS CONSEQUENCES TO IMPORTANT FEDERAL INTERESTS.

Finally, the Petition demonstrates that the decision below was wrong, and that the Ninth Circuit's error threatens severe consequences for the companies regulated by the California regime, and for national industries that depend on consistent enforcement of federal preemption provisions. Pet. 17-25; see also AAM Br. at 12-16. In response, the CEC argues that the Ninth Circuit correctly articulated the presumption against preemption, and correctly applied it to the California statute. The former contention is mistaken; the latter is largely beside the point at this stage, but in any event is also incorrect.

1. The CEC intimates that the Ninth Circuit was correct that the presumption against preemption always applies. It argues that the decision below "did no more than apply this Court's admonition that '[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.'" Opp. 7 (alteration in original; emphasis omitted) (quoting *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981)). The Ninth Circuit, however, did not even cite *Maryland* v. *Louisiana*, and the CEC misinterprets that case in any event. The CEC relies on a portion of *Maryland* in which the Court interpreted *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), and this Court already has explained that *Rice* "does not support the scope given to it" by the CEC, and that the presumption applies only when Congress legislates "'in a field which the States have traditionally occupied.'" *United States* v. *Locke*, 529 U.S. 89, 107-08 (2000) (quoting *Rice*, 331 U.S. at 230). *Locke* interprets in similar fashion *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996) (which the decision below did actually cite, Pet. App. 4a). See *Locke*, 529 U.S. at 108. In short, the Ninth Circuit indeed got it wrong, and the CEC now does the same.

Nor is the decision below correct because the California regulations fall within the State's police powers. Opp. 7. The

implication—although the CEC fails to explain it—is that the presumption applies whenever a State acts pursuant to its police powers. That is not the law. The presumption applies when there is a "significant" history of state regulation, or the dispute arises in "'a field which the States have traditionally occupied.'" *Buckman* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001); see *Bates* v. *Dow Agrosciences LLC*, 125 S. Ct. 1788, 1801 (2005) ("In areas of traditional state regulation, we assume that a federal statute has not supplanted state law ...."). It applies to areas in which the States *actually* have traditionally regulated, and the disclosure of energy appliance information is not such an area.

Contrary to the rule the CEC advances, this Court has rejected application of the presumption when a State plainly was acting pursuant to its police powers. In *Buckman*, for instance, the Court held that a claim of fraud—which unquestionably involves a State's general police powers—was not protected by the presumption against preemption because the variety of fraud alleged (fraud on a federal government agency) was not "'a field which the States have traditionally occupied.'" 531 U.S. at 347. The rule that the CEC proposes would prove far too much—nearly all state regulation is pursuant to the States' police powers, see *Barbier* v. *Connolly*, 113 U.S. 27, 31 (1884), and all state regulation can be characterized as such. The CEC's proposed rule is limitless.

Even were the CEC correct that some of this Court's precedents stand for the view that the presumption against preemption always applies, then that simply would mean that this Court's own decisions concerning the presumption are inconsistent. Some (like *Locke*, and the cases cited in the Petition at 14-15) stand for the proposition that the presumption applies only "'in a field which the States have traditionally occupied,'" *Locke*, 529 U.S. at 108, and others (like *Maryland* and *Medtronic*, if the CEC is correct) would mean that the presumption always applies. If the CEC is correct that a con-